FILE COPY

Office Supreme Court, U.S.
FILED
OCT 11 1960
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

October Term, 1960

No. 418

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSDELL,

Petitioners

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

HERBERT P. DENNIS,
Special Deputy Attorney General
State Capitol,
Harrisburg, Pa.
MARVIN H. LEVY,
Deputy Attorney General and Executive Secretary
Court House,
Harrisburg, Pa.
MAX E. HOFFMAN,
Assistant District Attorney
ARTHUR P. PETERSON,
Deputy Attorney General
State Capitol,
Harrisburg, Pa.
JAMES A. AMES,

TABLE OF CONTENTS

	Page
Brief for Respondent:	
Statement of the Case:	
I. The Proceedings Below	1
II. History and Facts of the Case	4
Reasons for Denying Writ	11
Conclusion	23

TABLE OF CITATIONS

Cases:

California v. Stroble, 343 U.S. 181, 192, 193 (1952)	12
Capriola v. U. S., 61 F. 2d 5 (7th Cir., 1932), cert. den. 287 U.S. 671	15
Com. v. Berman, 119 Pa. Super. Ct. 315 (1935)	15
Com. v. Brownmiller et al., 137 Pa. Super. Ct. 261, 267 (1939)	14
Com. v. Brownmiller, 141 Pa. Super. Ct. 107, 113 (1940)	14
Com. v. Dixon, 179 Pa. Super. Ct. 1, 6 (1955)	12
Com. v. Evans et al., 70 Dauph. 197, 202 (1957)	14
Com. v. Evans et al., 72 Dauph. 31 (1958)	2, 17
Com. v. Evans et al., 190 Pa. Super. Ct. 179 (1959)	2, 12, 13, 20, 21, 22, 23
Com. v. Evans et al., 399 Pa. 387, 160 A. 2d 407 (1960)	3
Com. v. Kirk and Skok, 141 Pa. Super. Ct. 123 (1940), aff'd 340 Pa. 346 (1941)	15
Com. v. Mathues, 40 Pa. Super. Ct. 546 (1909)	19
Com. v. Meyers, 290 Pa. 573, 581 (1927)	12

Com. v. Millen, 289 Mass. 441, 194 N.E. 463, 481 (1935) 19
Com. v. Novak, 165 Pa. Super. Ct. 576 (1949), cert. den. 339 U.S. 924 15
Com. v. Sanderson et al., 40 Pa. Super. Ct. 416 (1909), aff'd 227 Pa. 347 (1910) 15, 19
Com. v. Shumaker, 40 Pa. Super. Ct. 547 (1909) 19
Com. v. Snyder, 40 Pa. Super. Ct. 485 (1909) 19
Costello v. United States, 350 U.S. 359, 363 (1956) 14
Curcio v. United States, 354 U.S. 118 (1957) 21
Glasser v. United States, 315 U.S. 60, 88 (1941) 23
Hoag v. New Jersey, 356 U.S. 464, 465 (1958) 11
Leviton et al. v. United States, 193 F. 2d 848 (2d Cir.), cert. den. 343 U.S. 946 (1952) 12, 13
Lisenba v. California, 314 U.S. 219, 227 (1941) 22
McElree v. Darlington, 187 Pa. 593, 595 (1898) 21
Opper v. U. S., 348 U.S. 84 (1954) 15
Paoli v. United States, 352 U.S. 232 (1957) 16, 17, 18
People v. Miller, 129 Cal. App. 2d 305, 276 P. 2d 846, 848 (1954) 19
People v. Rossi, 270 App. Div. 624, 63 N.Y.S. 2d 4 (1946) 19
People v. Roxborough, 307 Mich. 575, 12 N. W. 2d 466 (1943) 19
Schaffer v. United States, 362 U.S. 511 (1960) 15
State v. Fox, 133 Ohio St. 154, 12 N.E. 2d 413 (1938) 19
United States v. Gottfried, 165 F. 2d 360, 367 (2d Cir., 1948), cert. den. 333 U.S. 860 17, 18
United States v. Griffin, 176 F. 2d 727 (3rd Cir., 1949) 18
United States ex rel. Thompson v. Price, 258 F. 2d 918 (3rd Cir., 1958), cert. den. 358 U.S. 922 22

ACT:

Act of May 21, 1937, P. L. 774, No. 211, 36 P.S. 652d, Sec. 4 19, 20

STATEMENT OF THE CASE

I.

THE PROCEEDINGS BELOW

Petitioners were convicted by a jury in the Court of Quarter Sessions of Dauphin County, Pennsylvania, for offenses involving conspiracy, false pretenses, and misbehavior in office. It was a joint trial. The several indictments were consolidated for trial purposes since the charges were similar, related and connected, all arising out of a multi-million dollar fraud against the Pennsylvania Turnpike Commission, an instrumentality of the Commonwealth of Pennsylvania. This fraud was carried out by means of a contract between the Commission and Manu Mine Research and Development Co. (Manu-Mine), a corporation owned and controlled by relatives of the then chairman of the Commission. The nature of the fraud will be described below. There was a total of nine defendants. The jury convicted five and acquitted four. One of those convicted was discharged on appeal by the Superior Court of Pennsylvania. Petitioners Evans and Torrance were, respectively, chairman and secretary-treasurer of the Pennsylvania Turnpike Commission, and petitioners Stickler and Landsidle were, respectively, president and general manager of Manu-Mine.

All of the defendants had individual counsel. At the very outset of the trial, the court permitted various coun-

sel to withdraw their appearance for defendants whom they had theretofore represented, and to enter their appearance for other defendants, thus giving all of the defendants and their counsel a tactical advantage in the examination of witnesses and enabling them to secure nine separate opening addresses, cross-examinations and summations to the jury. Moreover, the court permitted defense counsel to cross-examine co-defendants and their witnesses who took the stand and to ask them leading questions, thus, in effect, introducing substantial portions of the defense of their respective clients, some of whom did not take the witness stand.

The trial was one of the longest, if not the longest, criminal jury trial in the history of the Commonwealth. It began on June 4, 1957, and ended on July 24, 1957. It consumed thirty-eight trial days. Following the jury verdict, Motions for a New Trial and Arrest of Judgment were filed. Extensive briefs and oral arguments were made before the Dauphin County Court en banc. The jury verdicts were unanimously upheld by that court, consisting of four judges, in an opinion written by The Honorable Homer L. Kreider, Judge. *Commonwealth v. Evans et al.*, 72 Dauph. 31 (1958).

On appeal to the Superior Court of Pennsylvania, the convictions against the four petitioners were upheld. One count against the Petitioner Torrance was reversed on the misbehavior charge. The petitioners filed separate briefs in that court and made separate oral arguments lasting most of two days. The Superior Court, in an opinion written by President Judge Rhodes, *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179 (1959), upheld the convictions with the exception heretofore noted.

The Proceedings Below

A limited allocatur was granted by the Supreme Court of Pennsylvania. Briefs were filed and oral arguments were made by counsel for each of the defendants. The Supreme Court, in a per curiam opinion filed April 21, 1960, affirmed the Order and Judgments of the Superior Court on the opinion of President Judge Rhodes. *Commonwealth v. Evans et al.*, 399 Pa. 387, 160 A. 2d 407 (1960), Justices Bell and Benjamin R. Jones concurring and dissenting in part. Justices Bell and Jones concurred in the majority opinion with respect to the appeals of Stickler and Landsidle. Justice Bell, in the first sentence of his concurring and dissenting opinion, stated, "A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the Northeastern Extension of the Pennsylvania Turnpike, for which a number of people have been convicted and duly sentenced." (Petitioners' Paper Book App., p. 12a).

II.

HISTORY AND FACTS OF THE CASE

On September 9, 1956, the Attorney General of the Commonwealth of Pennsylvania filed a petition to the Dauphin County Court charging that organized systems of crime involving the officials and employes of the Pennsylvania Turnpike Commission existed within the Commonwealth, and requesting that the court convene an investigatory grand jury which would inquire into these and allied matters. On October 22, 1956, the court convened the investigatory grand jury, which proceeded to subpoena witnesses, books, documents and other evidence, heard and saw witnesses for several months and, on January 18, 1957, handed up a presentment naming a number of individuals, including petitioners, as having violated the criminal law of this Commonwealth, and recommended their indictment to the court. The violation arose out of a contract dated February 28, 1955 between Mann-Mine and the Commission for designing, performing and supervising a program of drilling on a section of the northeastern extension of the turnpike, to provide subsurface support. It was charged that under this contract Mann-Mine obtained $7,000,000.00 from the Commission by fraud and false pretenses, in conspiracy with certain turnpike officials and others. On January 23, 1957, the regular indicting grand jury of the County of Dauphin, after hearing evidence, returned indictments against the defendants.

History and Facts of the Case

At trial the Commonwealth proved the following facts. Manu-Mine, a Pennsylvania corporation, was organized in March of 1951. By 1953, its president and controlling stockholder was petitioner Stickler, a nephew of Mrs. Thomas J. Evans, whose husband, petitioner Evans, was and had been Chairman of the Pennsylvania Turnpike Commission for 16 years. Its other stockholders were Stickler's wife, and Richard Evans, son of Chairman Evans. These three stockholders were also the officers and directors of the corporation. Manu-Mine received its initial turnpike work in 1952, and from that time on until February 1956, more than *90%* of its receipts came from the Turnpike Commission. Manu-Mine was not required to competitively bid for *any* of its work with the Commission. The Manu-Mine stock was worth $100.00 per share at the time of its organization, but by October, 1955, largely as the result of its numerous turnpike contracts, its stock had increased in value to more than $12,500.00 per share (2953r). The most lucrative turnpike contract received by Manu-Mine was that dated February 28, 1955, which was the subject of petitioners' convictions.

This contract of February 28, 1955 came about in the following manner. In October of 1953, Manu-Mine was selected by the Commission to advise the Commission in designating the route of the northeastern extension of the turnpike where it traversed the coal measures. The route recommended by Manu-Mine was accepted by the Commission and land condemnation followed. On July 7, 1954, Manu-Mine was retained by the Commission to do exploratory drilling on the route which it had selected in order to give the Commission engineering advice on the need for subsurface support (5138r). Originally the con-

tract was to be for a *three-month period*, but at the urging of Manu-Mine, it was extended from time to time to cover *fifteen months* (2609r). Under this contract, Manu-Mine was paid $272,250.00 for *engineering* services and $104,712.60 for drilling (2609r). It was *not* bid (5201r).

Greiner & Company, the consulting engineers for the Commission, in their civil engineering report on the northeastern extension submitted in March of 1954 to the Commission, had indicated that there would be little difficulty and only minor expense involved in correcting any subsurface support problem, estimating a figure of $150,000.00 for the purchase of coal in place. In fact, in the construction budget there was *no* allocation of funds for subsurface support (5346r). As a result, however, of competitive bidding among contractors for primary excavation work on the northeastern extension, *an unanticipated $20,000,000.00 surplus arose* (4626r). Chairman Evans now concerned himself with what might be done with the $20,000,000.00, being advised by one of the investment bankers, Steel, who testified for the defense, that it would have to be spent on the northeastern extension (4625r, 4634r, 4635r).

Thereupon, at the close of 1954, *before* it had concluded its work on the exploratory drilling and engineering contract, which was to be the basis for advising the Commission on the need for subsurface support, Manu-Mine, through Stickler and Landsidle, began negotiating with the Commission's Construction Engineer, John D. Paul, for a contract to drill holes on that section of the northeastern extension traversing the coal measures. The holes were to be used for slushing silt and sand into voids purportedly existing beneath the surface.

While these negotiations were still going on, and before any contract had been awarded by the Commission, it became apparent in January 1955 that Manu-Mine had already been picked by Evans for the job, the need for which had not been established, and which, as will appear, was almost entirely unnecessary and made work (3295r, 4209r).

In November 1954, Manu-Mine had submitted a cost analysis of its drilling under its exploratory engineering contract of July 7, 1954, fixing the $14.00 per foot price for drilling on the basis of an *actual drilling rate of 35 feet per shift, and a profit of 10%*. Manu-Mine itself then drafted the contract for the actual drilling and slushing to be done for subsurface support, as distinct from the contract for exploratory drilling, which was supposed to determine if any program was necessary. On January 6, 1955, Manu-Mine, through Landsidle, submitted to Commission Engineer Paul a similar analysis for drilling to be done under the new contract, for which the price was to be $12.50 per foot (4802r). This analysis also represented that it was based *on a 10% profit, and the drilling rate was represented as 28 feet per shift instead of 25 feet*, resulting in the difference between $14.00 and $12.50 (4912r, 4936r). It was also based on use of a No. 32 drill manufactured by the Joy Manufacturing Company.

On February 28, 1955, this contract was approved at a meeting of the Commission and executed by Evans and Torrance for the Commission. There had been *no competitive bidding* on the contract (4507r). This was one of the first meetings of the Commission attended by Lawler, who had begun to serve as Secretary of Highways in January, and who was thereby an ex-officio member of

the Commission. Lawler relied on the assurances of Evans and Torrance that Manu-Mine was a company with an international reputation in the field, and the only company qualified to do the work covered by the contract. Actually, it had no such reputation and no such qualifications, and the representations were false.

Although Lawler voted in favor of the contract as an ex-officio member of the Commission, the contract was not thereafter submitted to the Department of Highways for study and approval, contrary to invariable custom and practice of the Commission for all such construction contracts (527r).

The contract which Manu-Mine drafted and the Commission adopted in the manner described, contained no specifications defining how the work was to be done. It provided for *no performance bond*. It placed Manu-Mine in the triple role of acting as engineer to the Commission and designer of the work to be done, contractor for the performance of the work, and inspector on the same job. It placed *no limitation on the number of feet to be drilled*. It contained no provision for renegotiation. It contained no provision for partial retention of funds due, to secure performance. It contained *no time limit for the performance of the job*, but in all respects was a completely open end contract, under which the Commission was in the position of relying on Manu-Mine's own advice as project engineer on what was necessary to be done (2323r, 2324r and 2352r).

Manu-Mine's original contract estimate for the entire job of drilling and slushing, as submitted in January 1955, called for a total expenditure of four and a half million dollars. As the actual job progressed, Manu-Mine sub-

mitted higher and higher estimates, reaching a peak of nineteen and a half million dollars, by steps, first to nine million dollars, then to thirteen and a half million dollars and then to the limit (5473r). Under the contract and prior to its suspension, Manu-Mine itself, for drilling and supervision, actually received $6,724,719.00 and for the slushing the Commission paid $2,451,030.37. *This resulted in a profit to Manu-Mine, not of the 10% which it had represented, but of 100%.*

The 10% profit, which Manu-Mine presented as the basis for the contract price, was predicated on a drilling rate of 28 feet per shift. The actual experience in the very first month of drilling showed that the rate was *179 feet per shift* (2334r). Stickler and Landsidle actually knew before executing this contract that the drilling rate would be much higher than 28 feet per shift, because they were going to use and did use a much faster drill than they represented in their cost analysis to the Commission, namely the so-called BH 58 drill, instead of the No. 32. This change in the drill to be used was not disclosed to the Commission, nor was the cost analysis ever revised to reflect it (4946r). *While the roadway cost itself amounted to a million dollars per mile, the subsurface support program dictated and performed by the Manu-Mine Company cost the Turnpike Commission in excess of $3,000,000.00 per mile* (2356r).

Ninety to ninety-five per cent of the drilling and slushing performed under the program designed, carried out and supervised by Manu-Mine was unnecessary and of no use in providing additional subsurface support (2112r). The contract price of $12.50 per foot for drilling was exorbitant and should have been at the most between $4.50 and about $5.50 a foot (1970r). Manu-Mine itself,

when required to bid competitively on a job for the Department of Mines of the Commonwealth, where Evans had no influence, in March of 1955, submitted a bid of $3.19 per foot for a substantially similar drilling job at Carbondale, and this bid was rejected in favor of a lower bid (2032r). On this basis of what work was actually necessary and what would have been a proper competitive price, Manu-Mine, instead of receiving almost $7,000,000.00 as it did, would have received no more than $300,000.00.

There was also introduced, but *against himself alone*, the grand jury testimony of the Commission's construction engineer, John D. Paul, which was read into the record by the court reporter who took the notes of testimony in the investigating grand jury. The trial jury was cautioned on *seven* separate occasions that this testimony was admissible against John Paul *alone* (2658r, 6379r, 6431r, 6435r, 6446r, 6474r, and 6475r).

On this contract, Manu-Mine's own controller, Siegfried, testified that *Manu-Mine's operating profit for the work for which it actually billed the Commission was* $5,148,120.12 *on a total billing of* $7,679,441.64 (2961r). He applied an overhead figure of 45% to arrive at the net profit, including in that factor over $200,000.00 paid in bonuses to employes and over $70,000.00 paid for advertising (2982r). Even with these reductions, *Manu-Mine's profit on the contract was* 100% *instead of the* 10% *represented* (2976r). Stickler charged to the cost of sales under this contract a trip to Hawaii for himself and his family, his wife's fur coat, the furniture in their house, a gift certificate to petitioner Torrance, secretary-treasurer of the Commission, and gift of a television set to the Commission's engineer Paul in December 1954 (2983r, 4582r). Manu-Mine also did free work for Torrance on his farm.

REASONS FOR DENYING THE WRIT

It is the position of the Respondent, that the Petitioners were not denied due process and equal protection of the laws under the federal constitution in their trials by the Commonwealth of Pennsylvania. The evidence was clearly sufficient to sustain all of the convictions and its sufficiency is not challenged here. The record shows that petitioners conspired to defraud the Pennsylvania Turnpike Commission of over $7,000,000.00 by the award of a contract for subsurface support, which was *ninety to ninety-five percent unnecessary*, to a company controlled by relatives of the Commission's chairman, at a fantastic price and in complete disregard of all safeguards normally provided in a public contract.

Petitioners had a fair trial, carefully reviewed by two appellate Courts of Pennsylvania. As petitioners themselves recognize: "It is a well-known and honored principle of this Court that in reviewing cases from the courts of the states, it does not invade a state's sovereignty by prescribing the procedures that states must use to afford due process to its citizens," and ". . . petitioners here are not attacking the processes of justice of the Commonwealth of Pennsylvania." (Pet. for Cert., p. 26.) Moreover, ". . . it has long been recognized as 'the very essence of our federalism that the states should have the widest latitude in the administration of their own system of criminal justice.'" *Hoag v. New Jersey*, 356 U.S. 464, 465 (1958).

The eleven alleged errors relied on by petitioners, viewed in the light of these principles and of the entire

record, raise no substantial federal constitutional question. They will now be considered in the order raised.

1. The alleged inflammatory speech of the Governor was made on October 22, 1956. The trial began on June 4, 1957, or approximately eight months later. No further continuance was asked. Although the remarks of the Governor were said to have been widely disseminated in Dauphin County by press, television and radio, the effect of these remarks upon the trial jury has not been raised with particularity by the usual methods, such as a motion for change of venue, a challenge to the array, or by individual challenges for cause during selection of the petit jurors on voir dire. *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179, 267 (1959). The defense offered no evidence to show that the trial jury formed "a fixed, biased and hostile opinion toward the defendant so that they could not fairly weigh in his behalf, such circumstances of doubt, extenuation or degree of guilt that may be present in the case, and thus make them unable to render a true verdict." *Commonwealth v. Meyers*, 290 Pa. 573, 581 (1927); *Commonwealth v. Dixon*, 179 Pa. Superior Ct. 1, 6 (1955).

The jury reached its conclusion without bias or prejudice, on overwhelming evidence.

This Court has held that even where newspapers, radio and television stations carried statements by public officials to the effect that they felt that the defendant was guilty and, further, where the officials even furnished the press, radio and television stations with copies of the alleged confession of the defendant, and such copies were disseminated to the public, the defendant was not denied due process under the Fourteenth Amendment. *California v. Stroble*, 343 U.S. 181, 192, 193 (1952). See *Levi-*

ton et al. v. United States, 193 F. 2d 848 (2d cir.), cert. denied, 343 U.S. 946 (memorandum of Mr. Justice Frankfurter) (1952). If petitioners were sustained on this point, the alarming result would be that they would be forever discharged and major crimes go unpunished, because of remarks made by a public official, months before the trial.

2. Petitioners complain that the indictments stated that certain "legal" requirements, i.e., competitive bidding, retention of fixed percentages, performance bond, negotiation clause, were omitted from the contract. Assuming, arguendo, that this is erroneous, it would be surplusage; the validity of the indictments is not affected by the elimination of the word "legal" or "legally." Eliminating the words "legal" or "legally," the indictments still charge that, in negotiating and obtaining the Manu-Mine contract, the defendants did not comply with the usual practice of the Commission regarding competitive bidding or include other contractual provisions normal to construction contracts, and that the failure to follow these usual procedures was one of the methods by which the fraud was perpetrated, the contract obtained, and the moneys paid, to the prejudice of the Commission. *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179, 200, 201 (1959). Petitioners were clearly apprised by the indictments of the charges against them, and were tried on those charges, not on any others.

3. It is alleged that the District Attorney and the Special Deputy Attorney General intruded upon the deliberations of the special investigating grand jury. This allegation is without merit and, in any event, of no significance, because *no* such allegation is made with respect to the *indicting grand jury*.

The special investigating grand jury minutes reveal that the foreman of the grand jury requested the presence of the District Attorney and the Special Deputy Attorney General for advice. "It is the duty of the District Attorney * * * to attend upon a Grand Jury, lay before them all matters upon which they are to pass, aid them in the examination of witnesses, and give general instructions as may be required." *Commonwealth v. Brownmiller*, 141 Pa. Superior Ct. 107, 113 (1940). Of this incident, Judge Neely said, "We think that the minutes of January 16 reveal no irregularity in the proceedings of the investigatory grand jury." *Commonwealth v. Evans et al.*, 70 Dauph. 197, 202 (1957), citing *Commonwealth v. Brownmiller et al.*, 137 Pa. Superior Ct. 261, 267 (1939). And, as noted above, no irregularity is alleged to have occurred before the *indicting grand jury*, so that trial of the charges on the merits was completely justified. See *Costello v. United States*, 350 U.S. 359, 363 (1956).

4. The motions to quash the indictments and subsequent motions for bills of particulars were denied and appeals were taken to the Superior Court of Pennsylvania. The appeals were held to be interlocutory and the same questions were presented upon final argument before the Superior Court. The refusal to quash was properly sustained for the reasons set forth in the foregoing paragraphs. Refusal of a bill of particulars was clearly discretionary.

5. The petitioners complain that they were prejudiced because the indictments were consolidated and the defendants tried together. The charges of conspiracy, false pretenses and misbehavior in office were all related, arising out of the same factual background.

In such circumstances, the granting of a severance is, under Pennsylvania law, within the discretion of the trial judge. *Commonwealth v. Novak*, 165 Pa. Superior Ct. 576 (1949), cert. denied, 339 U. S. 924. The trial judge, in refusing a severance, did not abuse his discretion. Rather, he followed established precedents in both the state and federal courts in like situations. See *Commonwealth v. Sanderson et al.*, 40 Pa. Superior Ct. 416 (1909), and related cases, aff'd. 227 Pa. 347 (1910); *Commonwealth v. Berman*, 149 Pa. Superior Ct. 315 (1955); *Commonwealth v. Kirk and Skok*, 144 Pa. Superior Ct. 423 (1940), aff'd. 340 Pa. 346 (1941). See also *Opper v. U. S.*, 348 U.S. 84 (1954), and *Caprada v. U. S.*, 61 F. 2d 5 (7th cir. 1932), cert. denied, 287 U.S. 671.

In *Schatter v. United States*, 362 U.S. 511 (1960), the Court, speaking through Mr. Justice Clark, held there was no impropriety in a joint trial "if they (defendants) are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

6 and 7. These allegations will be answered jointly since they involve the reading to the trial jury of the transcript of testimony of a co-defendant, Paul, which was given before the investigating grand jury. This testimony was offered, because it contained "admissions" against Paul and to a *large degree* furnished the basis for the Commonwealth's charge of a conspiracy against Paul.

(a) *In the reading of Paul's testimony, all necessary safeguards were scrupulously observed.*

The reading of John D. Paul's testimony began on June 27, 1956. It consisted of 184 pages of transcript.

The reading was done by Robert Wallower, one of the official court reporters of Dauphin County. Paul's attorney was given a copy of the transcript before the reading began. The trial consumed more than 6,000 pages, and Paul's testimony was introduced at nearly the end of the Commonwealth's case in chief, a point about half way in the record, nearly half way through the trial. The trial Judge admonished the jury *before* it was read, while it was being read and *afterwards* that it was admitted against John D. Paul *alone*, and not against any other defendant (2658r, 6379r, 6431r, 6435r, 6446r, 6474r and 6475r).

(b) *The reading of Paul's testimony is sustained by the overwhelming weight of authority, both federal and state.*

In *Paoli v. United States*, 352 U.S. 232 (1957), this Court upheld the admission against a co-defendant in a *federal trial* of a confession made after the termination of the conspiracy, even though the confession plainly implicated defendant, Paoli, against whom it was not admissible. The Court held that the trial Court's instructions to the jury limiting the effect of the confession were sufficiently clear, that it was reasonably possible for the jury to follow them, and that deletion from the confession of references to Paoli would have been impractical.

Judge Kreider, presiding at the trial in the present case, followed the requirements of Paoli to the letter, scrupulously admonishing the jury on many distinct occasions that Paul's testimony was admissible against him alone.

Here, as in *Paoli*, the separate interests of each defendant were emphasized throughout the trial. Each was

represented by his own attorney, who made a separate opening address, conducted a separate cross-examination and made a separate closing argument to the jury. In fact, defendant Evans had for himself a different attorney on each indictment, so that a total of three appeared for him.

Here, as in *Paoli*, Paul's confession was largely cumulative, since there was *already ample evidence* in the record to sustain the conviction of all defendants. Here, also, as in *Paoli*, the introduction of Paul's testimony, under the court's clearly limiting instructions, was postponed until the Commonwealth was preparing to close its case.

Here, as in *Paoli*, there is nothing in the record indicating that the jury was confused or that it failed to follow the court's instructions. On the contrary, the jury intelligently discriminated among the defendants, and after due deliberation convicted five and acquitted four.

Although the conspiracy here was much vaster in scope than that in *Paoli*, the part of each defendant was just as easily intelligible and clearly defined, and defendants were given full range in presenting their defenses. In fact, when defendants or their witnesses took the stand, other defense counsel, under the guise of "cross-examination" of such co-defendants or their witnesses, succeeded in putting in much of their defense, over the Commonwealth's objection. (See e.g. cross-examination by other defendants' counsel of defendants Torrance, Stickler and Landsidle.) See Judge Kreider's opinion in *Commonwealth v. Evans et al.*, 72 Dauph. 31, 111 (1958).

In an earlier case, *United States v. Gottfried*, 165 F. 2d 360, 367 (2nd cir. 1948), cert. denied, 333 U. S. 860,

Judge Learned Hand, speaking for the majority on the same subject, said:

> "The propriety of admitting a confession or an admission of one of the accused upon a trial of him and others has come up again and again; and, if the customary caution is given that it must be considered only against the declarant (here that caution was several times repeated), the courts have nearly always held that its reception is not erroneous against the others. Nobody can indeed fail to doubt whether the caution is effective or whether usually the practical result is not to let in hearsay. However, hearsay is admissible in all sorts of situations when the truth is not otherwise available, and the fact that this may be another exception is not conclusive against it. As we said in Nash v. United States, supra: 'In effect . . . the rule probably furthers, rather than impedes the search for truth, and this perhaps excuses the device which satisfies form while it violates substance.' In Anderson v. United States, the confession had itself been unlawfully obtained and was incompetent against the declarant; for that reason its admission resulted in a mistrial of the other accused. Hale v. United States was a prosecution for murder, and United States v. Haupt was for treason; both are capital offenses for which the law has always had especial solicitude; and both are atypical."

See also *United States v. Griffin*, 176 F 2d 727 (3rd cir. 1949).

The courts of this Commonwealth have followed the rule sustained by this Court in the *Pauli* case, that declarations by a co-conspirator, after the termination of the

conspiracy, are admissible in evidence in a joint trial, against the person making the declaration, under appropriate instructions to the jury from the trial judge. *See Commonwealth v. Sanderson et al.*, 40 Pa. Superior Ct. 416 (1909); *Commonwealth v. Snader*, 40 Pa. Superior Ct. 485 (1909); *Commonwealth v. Mathues*, 40 Pa. Superior Ct. 546 (1909) and *Commonwealth v. Shaffner*, 40 Pa. Superior Ct. 547 (1909) (involving a joint trial for conspiracy to defraud the Commonwealth).

Similarly, in other jurisdictions, non-confessing defendants' rights are considered properly safeguarded by the trial judge's admonition to the jury. *People v. Miller*, 129 Cal. App. 2d 365, 276 P. 2d 846, 848 (1954); *State v. Fox*, 133 Ohio St. 154, 12 N.E. 2d 413 (1938); *Commonwealth v. Millen*, 289 Mass. 441, 194 N.E. 463, 484 (1935). And see *People v. Roxborough*, 307 Mich. 575, 12 N.W. 2d 466 (1943) (41 defendants jointly tried for conspiracy); *People v. Rossi*, 270 App. Div. 624, 63 N.Y.S. 2d 4 (1946).

Thus, the principle and practice followed by the trial Judge here have been upheld by this Court, by the federal courts of appeals, by the appellate Courts of Pennsylvania, and in other jurisdictions generally.

8. The petitioners allege that high officials of the Commonwealth were used to present and interpret state law to the jury and further, that the petitioners were denied their right to effective cross-examination.

At the beginning of the trial, the Commonwealth called Harrington Adams, a Deputy Attorney General, who read into evidence Section 4 of the Act of May 21, 1937, P.L. 774, No. 211, 36 P.S. 652k which created the Pennsylvania Turnpike Commission and made it an instrumentality of the Commonwealth. Adams also read the provision of

Section 4 giving the Commission the power to contract, with the proviso that contracts relating to construction shall be approved by the Department of Highways and that such construction be under the supervision of the Department of Highways. Adams read further from the statutes the enacting law which created the northeastern extension of the Pennsylvania Turnpike and the law which gave the Commission the power to contract for its construction, subject to the same approval and supervision by the Department of Highways.

John R. Rezzolla, Jr., Chief Counsel for the Department of Highways, also testified to the statutes.

It is the general rule as contended by defendants that the trial Judge, not expert witnesses, should give instructions to the jury on domestic law and its application to the case. The witnesses did *not* give an opinion or interpretation of the laws as applied to this case. See *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 237, 238, 239 (1959).

6. Petitioners contend that the trial Judge forced petitioner Stickler, in front of the jury, to produce his company's business records for which the Commonwealth had subpoenaed the wrong person.

The Commonwealth issued a subpoena to Clyde J. Siegfried, Controller of Manu-Mine, to present certain corporate books and records. When the witness Siegfried was on the witness-stand, he was questioned as to whether he had such records. Counsel for Stickler volunteered that it was not desired that anything be concealed and that the records shown to be relevant would be produced. Accordingly, the Commonwealth asked that they be produced.

The privilege against self-incrimination does not extend to the corporate records here involved. "It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. A corporate officer may not withhold testimony or documents on the ground that his corporation may be incriminated. * * * Nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production." *Curcio v. United States*, 354 U. S. 118 (1957). The books and papers of a corporation are not the property of the officers and may be used against them. *McElree v. Darlington*, 187 Pa. 503, 595 (1898). That the colloquy between counsel and the trial Judge took place before the jury was brought about by Stickler's counsel, who interrupted the questioning of Siegfried relative to the subpoena by stating that the documents were in the possession of Stickler and that they would be produced if shown to be relevant. Counsel could "easily have made the remarks at sidebar beyond the hearing of the jury if it were so desired. The contention is without merit." *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 240, 241 (1959).

10. The petitioners complain that the trial Judge allowed the Commonwealth to present witnesses to the jury who testified about their own crimes and conspiracy which had no connection with the charges in the case.

During the course of the trial, petitioner Stickler and the witness Luke, Mann Mine's project engineer, testified in response to defendants' counsel's questioning, that no irregularities had occurred on the job with respect to the drilling and slushing activities. The Commonwealth in rebuttal produced witnesses who testified that such ir-

regularities did occur. Their testimony was limited by the trial Judge to attacking the credibility of Stickler and Luke. The determination of what is admissible on rebuttal is primarily for the discretion of the trial Court. The jury was carefully instructed that it was not evidence that any offense was committed by any of the defendants. The testimony of these rebuttal witnesses was to the effect that, as Manu-Mine inspectors, they had entered into an agreement to give fictitious weight slips for loads of silt not delivered and to look the other way when silt was dumped about the countryside, because the holes drilled by Manu-Mine would not take the flushing material. This evidence was thus relevant directly, in addition to rebutting Stickler and Luke, to show the failure of the drilling and supervising program of Manu-Mine to meet its ostensible purpose. As Judge Rhodes, in the Superior Court opinion, said, "The testimony of these inspectors was an elaboration upon and corroborative of that of Oswald which had been presented in the Commonwealth's case in chief. The testimony did not relate to a collateral matter but to one germane to the issue and it was proper to permit it in rebuttal. Where evidence would have been admissible in the Commonwealth's case in chief, it may properly be received in rebuttal for the purpose of contradicting the testimony offered by the defendant." *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 252, 253 (1959). The Fourteenth Amendment leaves the states free to adopt such rules of relevance. *Lisenba v. California*, 314 U. S. 219, 227 (1941). Cf. *United States ex rel. Thompson v. Price*, 258 F. 2d 918 (3rd cir. 1958), cert. denied 358 U.S. 922.

11. The petitioners contend that they were denied due process in that the trial judge was biased and unfair.

The short answer to this is best stated by President Judge Rhodes, writing for the majority in *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, at p. 208: "We conclude this opinion by referring to one other allegation of the defendants to the effect that the trial Judge was biased and unfair. This is devoid of merit. As a matter of fact, under the circumstances, he displayed unusual self control and forbearance. There were lengthy and repetitious objections by *fourteen* defense counsel during the trial, and at its conclusion, in support of their motions, they assigned nine hundred forty-one (941) reasons, and two hundred twenty-one (221) additional reasons were incorporated by reference. In the record of sixty-five hundred (6500) pages, we find no justification for the criticism by defendants of the conduct of the trial Judge. It is our conclusion that defendants had a fair and impartial trial, and that there was no violation of due process of law."

As said by Mr. Justice Frankfurter concurring in *Glasser v. United States*, 315 U.S. 60, 88 (1941): "It is a common place in the administration of criminal justice that the actualities of a long trial are too often given a mere pretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

CONCLUSION

The petitioners were ably represented by experienced counsel in every step of this case. The jury verdicts against them were upheld unanimously by the Dauphin County Court consisting of four judges; by a majority of the Pennsylvania Superior Court; on allocatur by a per curiam opinion of the Supreme Court of Pennsylvania af-

firming the Superior Court's decision on the opinion of President Judge Rhodes. The concurring and dissenting opinion of Justice Bell, joined in by Justice Benjamin R. Jones; sets forth in the first sentence that "A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the northeastern extension of the Pennsylvania Turnpike for which a number of people have been convicted and duly sentenced." The sufficiency of the evidence to sustain petitioners' convictions is not questioned, and in fact it was overwhelming. The petitioners have not presented any substantial federal question. They had a fair trial, and were denied neither due process nor equal protection of the laws.

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HUETTE F. DOWLING,
Special Deputy Attorney General,
State Capitol, Harrisburg, Pa.

MARTIN H. LOCK,
District Attorney of Dauphin County,
Court House, Harrisburg, Pa.

MARY F. WERNER,
Assistant District Attorney,
Court House, Harrisburg, Pa.
Deputy Attorney General,

ALFRED P. FILIPPONE,
State Capitol, Harrisburg, Pa.

ANNE X. ALPERN,
Attorney General,
State Capitol, Harrisburg, Pa.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 418

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSIDLE, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*

REPLY

Petitioners had hoped that when this case was presented to the highest tribunal of the land that the Commonwealth of Pennsylvania would abandon the sensationalism technique of prosecution which destroyed petitioners' basic rights in the lower courts. It was hoped that the Commonwealth would meet petitioners on the true issue raised here—whether petitioners received a fair trial.

But the Brief in Opposition shows that hope to have been both fond and foolish. Once again the irresponsible speech of the Pennsylvania Governor echoes forth and, in place of proof that a fair trial was had, comes the same mass of inflammatory generalities in an attempt to turn the eyes and minds of this Court away from the denial of justice, as the eyes and minds of the Pennsylvania juries and judges were turned.

Respondent Avoided the Issue and Misstated the Facts

In this spirit the Commonwealth took pains to quote twice the opening sentence of Justice Bell's concurring and dissenting opinion in the Supreme Court of Pennsylvania, *Commonwealth* v. *Evans, et al.*, 399 Pa. 387, concerning a "gigantic fraud". Neglected in the Brief in Opposition is the fact that Justice Bell went on to hold that at least two of the petitioners here did not have a fair trial.

What the Commonwealth cannot seem to grasp in connection with the so-called "gigantic fraud" is that it makes not one whit of difference whether one dollar or twenty million dollars are involved in this case. As previously stated the question is whether petitioners were accorded a fair trial within the ambit of their constitutional rights.

Even the honest efforts of accused men to save themselves before the bar of justice is represented to this Court as something to be weighed against them. At page 2 of the Brief in Opposition, the Commonwealth characterizes the retention of individual counsel as designed to obtain "a tactical advantage". Does the Commonwealth suggest that a single counsel should have been employed to defend nine men against upwards of 200 separate offenses in a seven week trial? Would that have been in the interest of justice?

At page 3 it is asserted that each petitioner's counsel argued before the Supreme Court of Pennsylvania. In fact, only three out of seven argued, and one of these had to make a special request for permission to do so. Finally, in closing its brief at page 23, respondent once again asks this Court to regard unfavorably the defendants' efforts to defend themselves by emphasizing

the number of the defense counsel and their vigorous efforts to defend.

The Commonwealth's brief is saturated with unfounded misstatements of fact and distorted representations of the law, although there is little of the latter. Petitioners, mindful of the extensiveness of the records and briefs already before this Court, wish only to point out the most unconscionable.

1. At pages 6 and 7, it is insinuated that some dishonesty was involved in the contract of July 7, 1954, in that it was extended, was for engineering, and was not bid. At no time has the good and honest performance of this contract ever been challenged with fact, but only by insinuation, and it is not and never has been involved in this case.

2. One Commissioner, Lawler, is said to have "relied on the assurances of (Commissioners) Evans and Torrance that Manu-Mine was a company with an international reputation in the field, and the only company qualified to do the work covered by the contract." (Br. Op. p. 8) Lawler made such a statement, but on cross-examination he explained his reason for voting in favor of the contract. "I depended upon the legal counsel, I depended on our engineering staff. I depended upon our consulting engineers. That is why the Turnpike has retained these people to advise and instruct us commissioners." (597r). At 602r he continued: "... That is why we have those people here. That is why we pay them such salaries ..."

3. In several places, respondent asserts that it was unnecessary to fill in, to flush silt into the abandoned mines that crisscross under the Turnpike, that the work was 90% to 95% unnecessary. Anyone who is

familiar with the frequent land collapses in the Pennsylvania coal regions knows this to be an irresponsible statement. In his dissent in the Superior Court in this case, Judge Watkins, an acknowledged expert, discusses the question in *Commonwealth* v. *Evans, et al.*, 190 Pa. Superior Ct. 179, at 288, et seq. He points out that a Commonwealth witness, Beaney, who testified that the work "for the most part, with the exception of two or three areas, was unnecessary . . . ," in June 1959 was one of three mine inspectors who reported to the Governor after a special study, that "It is our opinion that subsidences . . . will continue . . . and that the only solution . . . is a long range flushing program." The area involved was the same as that traversed by the Turnpike. Judge Watkins found the report to be a conclusive contradiction of the Commonwealth argument that after seven years an abandoned mine has settled as much as it ever will. At page 291, he says: "The report clearly indicates that there is always a danger of subsidence regardless of the length of time that has elapsed after the last mining or robbing." (See Record, Vol. XXI, 403e-407e for photographs of subsidence.)

4. At page 14 et seq., concerning the consolidation for trial, respondent blandly overlooks the conflict and mutual contradictions in the three different offenses which petitioners emphasized in the Petition:

Having skipped these crucial differences, respondent then casually cites *Schaffer* v. *United States*, 362 U.S. 511, and quotes from it. Petitioners call the Court's attention, and respondent's too, to the offenses there involved. All defendants in *Schaffer* were charged with the same offense: transportation of stolen goods.

How close is this to this case in which one indictment charges that two petitioners obtained the contract by the false pretense of deceiving the other two petitioners while another indictment charges the same two petitioners, charged with false pretense, of *conspiring with* the two "deceived" petitioners to obtain the very same contract? And in the *Schaffer* case, Justice Clark went on to "emphasize" in that case itself that ". . . the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice appears." 4 L ed. 2d 921, 925.

5. At page 16, Paul's attorney was *not* "given a copy of the transcript before the reading began." He received a few pages at a time from the prosecution during the testimony. See p. 2658r of the Record.

6. At pages 19-20, respondent asserts that Commonwealth witnesses Harrington, the Deputy Attorney General, and Rezolla, the Department of Highways General Counsel, did not interpret laws "as applied to this case" to the jury. The nice distinction attempted by the quoted words is meaningless. A reading of the testimony of these two men belies both the distinction and the assertion. Moreover, petitioners attacked the totality, i.e., the reading and interpretation of law, some of it inapplicable, by some of the highest Commonwealth legal officials. See Petition, pp. 23-24, 40-41.

7. At pages 21-22, respondent asserts that petitioner Stickler and Luke a Manu-Mine employee testified "no irregularities had occurred on the job." This is false. Both said they did not "know" of such irregularities. (4709r, 3291r). This was no basis for rebuttal witnesses as shown at page 44 of the Petition.

The few points covered above adequately show that the Commonwealth refuses to meet the true issue raised by the Petition, that it is proceeding now as it has done throughout this case. It has resorted to a strategy of sensationalism calculated to arouse and prejudice this Court by use of multi-million dollar figures and headline adjectives. And finally, it has not hesitated to misstate even facts that can be checked against the Record.

Petitioners respectfully request this Court to grant the writ of certiorari.

Respectfully submitted,

PEYTON FORD
DAVID M. PHELAN
1000 Connecticut Avenue
Washington 6, D. C.
Attorneys for Petitioners

Of Counsel:

FORD, LARSON, GREENE AND HORAN
Washington 6, D. C.

FREDERICK G. MCGAVIN
McGavin, De Santis & Koch
Reading, Pa.

EARL V. COMPTON
Harrisburg, Pa.

DAVID J. CONROY
Scranton, Pa.

H. G. STUTZMAN
Stutzman, Lewis & Sidoriak
Pottsville, Pa.

DAVID S. KOHN
Kohn, Adler & Schatt
Harrisburg, Pa.

ERNEST S. BURCH
JAMES H. STEWART, JR.
Nauman, Smith, Shissler & Hall
Harrisburg, Pa.